

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS**

Case No. 02-4027-JAR

On September 24, 1999, plaintiff filed her application for a period of disability and disability insurance benefits, claiming disability since November 26, 1997, due to hair loss, cervical strain,

severe whiplash, vertigo, neck and left shoulder injuries, left wrist and right knee pain, post traumatic stress syndrome, and muscle spasms. The application was denied both initially and upon reconsideration. At plaintiff's request, an administrative law judge (ALJ) held a hearing on June 6, 2000, at which both plaintiff and her counsel were present. On June 22, 2001, the ALJ rendered a decision denying all benefits, on the basis that plaintiff was not under a "disability" as defined by the Social Security Act. After the ALJ's unfavorable decision, plaintiff requested review by the Appeals Council; her request for review was denied on December 7, 2001. Thus, the ALJ's decision is the final decision of defendant.

II. Standard of Review

Judicial review under 42 U.S.C. § 405(g) is limited to whether defendant's decision is supported by substantial evidence in the record as a whole and whether defendant applied the correct legal standards.¹ The Tenth Circuit has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."² In the course of its review, the court may not reweigh the evidence or substitute its judgment for that of defendant.³

III. Relevant Framework for Analyzing Claim of Disability and the ALJ's Findings

"Disability" is defined in the Social Security Act as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment"⁴ The

¹See *White v. Massanari*, 271 F.3d 1256, 1257 (10th Cir. 2001) (citing *Castellano v. Sec'y of Health & Human Servs.*, 26 F.3d 1027, 1029 (10th Cir. 1994)).

²*Id.* (quoting *Castellano*, 26 F.3d at 1028).

³ *Id.*

⁴*Williams v. Bowen*, 844 F.2d 748, 750 (10th Cir. 1988) (quoting 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (1982)).

Social Security Act further provides that an individual “shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy”⁵

The Social Security Administration has established a five-step sequential evaluation process for determining whether a claimant is disabled,⁶ and the ALJ in this case followed the five-step process. If a determination can be made at any of the steps that a claimant is or is not disabled, evaluation under a subsequent step is not necessary.⁷ Step one determines whether the claimant is presently engaged in substantial gainful activity.⁸ If she is, disability benefits are denied.⁹ If she is not, the decision maker must proceed to the second step.¹⁰ Here, the ALJ determined that plaintiff was not engaged in substantial gainful activity and, thus, properly proceeded to the second step.

The second step of the evaluation process involves a determination of whether “the claimant has a medically severe impairment or combination of impairments.”¹¹ This determination is governed by certain “severity regulations,” is based on medical factors alone, and, consequently, does not include consideration of such vocational factors as age, education, and work experience.¹²

⁵*Id.* (quoting 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (1982 & Supp. III 1985)).

⁶*See id.* (citing 20 C.F.R. §§ 404.1520, 416.920 (1986)).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* (quoting *Bowen v. Yuckert*, 107 S. Ct. 2287, 2291 (1987)).

¹² *Id.* (citing 20 C.F.R. §§ 404.1520(c), 416.920(c) (1986)).

Pursuant to the severity regulations, the claimant must make a threshold showing that her medically determinable impairment or combination of impairments significantly limits her ability to do basic work activities.¹³ If the claimant is unable to show that her impairments would have more than a minimal effect on her ability to do basic work activities, she is not eligible for disability benefits.¹⁴ If, on the other hand, the claimant presents medical evidence and makes the de minimis showing of medical severity, the decision maker proceeds to step three.¹⁵ The ALJ in this case concluded that plaintiff's physical impairments satisfied the severity requirement and, thus, the ALJ proceeded to step three; however, the ALJ found that plaintiff's mental impairments did not meet the severity requirement.

In step three, the ALJ "determines whether the impairment is equivalent to one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity."¹⁶ If the impairment is listed and thus conclusively presumed to be disabling, the claimant is entitled to benefits.¹⁷ If not, the evaluation proceeds to the fourth step, where the claimant must show that the "impairment prevents [the claimant] from performing work he has performed in the past."¹⁸ If the claimant is able to perform her previous work, she is not disabled.¹⁹ With respect to the third step of the process in this case, the ALJ determined that plaintiff's impairments were not

¹³*Id.* at 750-51 (citing 20 C.F.R. §§ 404.1521(b), 416.921(b) (1986)).

¹⁴*Id.* at 751.

¹⁵*Id.*

¹⁶*Id.* (citing 20 C.F.R. §§ 404.1520(d), 416.920(d) (1986); *Bowen v. Yuckert*, 107 S. Ct. at 2291).

¹⁷*Id.*

¹⁸*Id.* (citing 20 C.F.R. §§ 404.1520(e), 416.920(e) (1986); *Bowen v. Yuckert*, 107 S. Ct. at 2291).

¹⁹*Id.*

listed or medically equivalent to those listed in the relevant regulations. At the fourth step, the ALJ concluded that plaintiff was unable to perform past relevant work.

Thus, the ALJ proceeded to the fifth and final step of the sequential evaluation process—determining whether the claimant has the residual functional capacity (RFC) “to perform other work in the national economy in view of [her] age, education, and work experience.”²⁰ At that point, the ALJ properly shifted the burden of proof to defendant to establish that plaintiff retains the capacity “to perform an alternative work activity and that this specific type of job exists in the national economy.”²¹ At this step, the ALJ concluded that plaintiff was not disabled, a conclusion that rested on a finding that plaintiff, despite possessing certain physical limitations, nonetheless could perform a significant number of jobs in the state and national economies, including performing the full range of light work with some slight limitations.

IV. Analysis of Plaintiff’s Specific Arguments

Plaintiff contends that the ALJ’s decision was erroneous in three respects: he erred in determining at step two, that her mental impairment was not severe; there was not substantial evidence supporting his finding that plaintiff’s complaints of pain were not entirely credible; and he erred in finding at step five that plaintiff can perform the full range of light work. The court addresses each of these arguments in turn.

A. Plaintiff’s Mental Impairment

The ALJ determined at step two that plaintiff’s mental impairment did not meet the severity

²⁰See *id.* (quoting *Bowen v. Yuckert*, 107 S. Ct. at 2291).

²¹See *id.* (citations omitted); accord *White*, 271 F.3d at 1258 (at fifth step, burden of proof shifts to Commissioner to show that claimant retains the functional capacity to do specific jobs).

requirement; and he did not consider plaintiff's mental impairments when analyzing the rest of plaintiff's claim. This Court finds that the ALJ's step two determination of no severe mental impairment is supported by substantial evidence in the record. The ALJ relied on the state agency physicians; there were no statements from any other medical sources regarding the effects of plaintiff's mental impairments; and there was no other substantial evidence of a mental impairment.

Dr. Mintz, a state agency physician, reviewed plaintiff's medical records and examined and assessed her himself on October 29, 1999. (Tr. 187-90.) Dr. Mintz reported that plaintiff had been depressed since her accident, with crying spells, lowered self-esteem, and sleep difficulties. He reported that she was fearful and anxious at times when she rode in an automobile. He opined that she had dysthymia, mild; anxiety disorder with panic attack symptoms; and a Global Assessment of Functioning (GAF) of 65, which is indicative of mild limitations.

The ALJ also relied on the state agency psychologist who examined plaintiff, reviewed her records, and concluded that her impairments were not severe. The psychologist noted in his Psychiatric Review Technique Form that the record showed that plaintiff had: no restriction in her daily activities; no difficulty maintaining social functioning; seldom demonstrated deficiencies in concentration, persistence or pace. He further noted that the evidence was insufficient to show any episodes of deterioration or decompensation. He found that plaintiff's mental impairments were not severe enough to affect her ability to care for her children and household.

In demonstrating severity, plaintiff "must make a threshold showing that [her] medically determinable impairment or combination of impairments significantly limits [her] ability to do basic

work activities, i.e., ‘the abilities and aptitudes necessary to do most jobs.’”²² Plaintiff has the burden at this level to show that the impairment would have more than a minimal effect on her ability to do work activities.²³

There is substantial evidence supporting the ALJ’s determination that plaintiff’s mental impairments did not have more than a minimal effect on her ability to do basic work activities. Plaintiff failed her burden of proof by relying solely on the fact that she had been prescribed a number of medications. At the time of the hearing, plaintiff was taking only one prescription medication for her mental health, Lorazepam for her panic attacks.

Moreover, the fact that plaintiff was taking prescription medication(s) is alone, insufficient evidence. Plaintiff must produce medical evidence that shows how her impairment affects her ability to work.²⁴ Although plaintiff produced medical evidence that her doctors discussed with her, and prescribed medication for, her depression and panic attacks, she produced no medical evidence that this affected her basic work abilities.

In 1998, plaintiff complained to Dr. Searight that her depression affected her desire to go out to the store. Dr. Searight prescribed medication, and at her next visit, plaintiff reported that she felt better. (Tr. 117.) In 1999, Dr. Baade noted that plaintiff’s increased anxiety and panic attacks were fairly debilitating; and plaintiff reported to Dr. Baade that her relationship with others was “irritable.” (Tr. 177, 181.) But there is no evidence that the depression, anxiety and panic attacks affected her ability to work. There is no evidence that work activities cause or contribute to her

²²*Id.* at 751 (citing 20 C.F.R. §§ 404.1521(b), 416.921(b) (1986); accord *Bowen v. Yuckert*, 107 S.Ct. at 2291)).

²³*Id.*

²⁴*Hinkle v. Apfel*, 132 F.3d 1349, 1352 (10th Cir. 1997).

depression, anxiety and panic attacks.

Rather, the evidence is that plaintiff's panic attacks stem from her fear of riding in cars, not from any work related activities. Yet this anxiety from riding in cars does not affect plaintiff's ability to drive. The ALJ noted that plaintiff's anxiety does not preclude her from regularly driving her husband to and from work, so that she has access to the family's only car while her husband is at work. Furthermore, there is no evidence that plaintiff's mental impairments were severe enough to affect her daily living activities. The ALJ noted that plaintiff was able to care for her children and household, concentrate, and follow instructions.

Therefore, there was sufficient evidence supporting the ALJ's finding at step two, that plaintiff failed her burden of proving that her mental impairments caused more than a minimal effect on her ability to do basic work activities.

B. Assessment of Plaintiff's Credibility

Plaintiff contends that the ALJ did not assess the credibility of her subjective complaints of pain in accordance with the Tenth Circuit's standards in *Luna v. Bowen*.²⁵ The ALJ concluded that plaintiff's complaints were "credible as to the extent of her symptoms of pain and dizziness, but not as to their allegedly disabling effect." Under *Luna*, the ALJ must decide whether a claimant's subjective claims of pain are credible, considering such factors as a claimant's persistent attempts to find relief for her pain and her willingness to try any treatment prescribed, regular contact with a doctor, the possibility that psychological disorders combine with physical problems, the claimant's daily activities, and the dosage, effectiveness, and side effects of medication.²⁶ Moreover, the ALJ

²⁵834 F.2d 161 (10th Cir. 1987).

²⁶*Id.* at 165-66.

must give specific reasons why he or she rejects a claimant's subjective complaints of pain.²⁷ Ultimately, credibility determinations "are peculiarly the province of the finder of fact," and should not be upset if supported by substantial evidence.²⁸

A review of the ALJ's decision in this case reveals that he did not address every *Luna* factor. There is no requirement that the ALJ make a finding with regards to each of the factors listed in *Luna*.²⁹ Some of the *Luna* factors analyzed by the ALJ were supported by substantial evidence in the record. The ALJ found that plaintiff had a steady prior work record and did not appear to lack motivation to work, factors of course weighing in favor of plaintiff's credibility.

Although plaintiff complains that the ALJ did not treat her mental impairment as a factor in his analysis of credibility, this was no error; there was no evidence that her depression, anxiety or panic attacks contributed to her pain or other physical problems. Similarly, there is no support for plaintiff's contention that the ALJ erred in considering that "objective abnormal findings [of pain] have been limited." This is an appropriate, albeit nondispositive factor in evaluating the credibility of a subjective complaint of pain. The ALJ did not err by factoring into his decision that "objective abnormal findings" were limited.

Although the ALJ considered some of the *Luna* factors, and although some of the factors he addressed find some evidentiary support, the ALJ's analysis was flawed in several respects. Some findings were not supported by substantial evidence. Some findings were based on selected evidence; and the ALJ inexplicably failed to discount or even mention other, contradictory evidence

²⁷*White v. Massanari*, 271 F.3d 1256, 1261 (10th Cir. 2001) (citing *Kepler v. Chater*, 68 F.3d 387, 390-91 (10th Cir. 1995)).

²⁸*Id.* (citing *Kepler*, 68 F.3d at 390-91).

²⁹*Thompson v. Sullivan*, 987 F.2d 1482, 1490 (10th Cir. 1993).

in the record. And, with respect to some factors, the ALJ improperly relied on matters outside of the record.

The ALJ found that plaintiff's daily activities, including driving her husband to and from work, cooking full meals, doing some laundry, and taking care of her large family, were activities inconsistent with her allegations of disabling pain. But, the record demonstrates that plaintiff's daily activities require assistance and periods of rest. She cooks, does laundry, and drives nearly every day. These activities do not seem to be performed at a level that is consistent with the ability to perform substantial gainful activity every day. Although the ALJ accurately noted that plaintiff does 25 to 30 loads of laundry each week some with help, he failed to mention or discuss the evidence that plaintiff must rest every day for 60 to 90 minutes after performing some of her household chores. (Tr. 318.) Nor did the ALJ mention that while plaintiff cooks every day, she cooks easy meals and gets help from her husband if she is feeling bad (Tr. 73, 80).

Moreover, the ALJ questioned whether her pain was disabling, when "written evidence shows that [plaintiff] has served as a foster parent for the Kansas Department of Social and Rehabilitative Services." (Tr. 18.) This the ALJ found significant, noting that "her ability to perform this service, on top of managing a large blended family of her own, suggests that the claimant has few if any functional limitations." (Tr. 18.) But, there is no such evidence in the record. The ALJ did not state what this "written evidence" was; and plaintiff denies that she has ever served as a foster parent. The ALJ erred in apparently relying on evidence not in the record.

While relying on matters outside the record, the ALJ inexplicably did not consider a third party questionnaire filled out by plaintiff's husband, concerning her daily activities. (Tr. 79-83.) Social Security Ruling 96-7p states:

[W]henver the individual's statements about the intensity, persistence, or functionally limiting effects of pain or other symptoms are not substantiated by objective medical evidence, the adjudicator must make a finding on the credibility of the individual's statements based on a consideration of the entire case record. This includes the medical signs and laboratory findings, the individual's own statements about the symptoms, *any statements and other information provided by treating or examining physicians or psychologists and other persons about the symptoms and how they affect the individual*, and any other relevant evidence in the case record. This requirement for a finding on the credibility of the individual's statements about symptoms and their effects is reflected in 20 CFR 404.1529(c)(4) and 416.929(c)(4).³⁰

While it is true that plaintiff's husband's answers on the daily activities questionnaire are similar to plaintiff's answers, the ALJ did not discuss this evidence or discuss why he discredited it. On remand, the ALJ should consider in his credibility determination the daily activities questionnaire plaintiff's husband filled out. The ALJ will also be asked to consider this evidence as part of plaintiff's RFC determination.

In rejecting the credibility of plaintiff's complaint that the pain was disabling, the ALJ also relied on the fact that plaintiff had not been prescribed potent narcotic medication. This is a factor under *Luna*. The ALJ may consider the presence or absence of significant pain medication in assessing plaintiff's claim of disabling pain.³¹

But, plaintiff erroneously contends that the ALJ should have analyzed whether such medication would have made a difference, or whether plaintiff could have afforded such medication. Such questions are relevant only when plaintiff fails to comply with a prescribed treatment or

³⁰Soc. Sec. Rul. 96-7p, 1996 WL 374186, at 2 (emphasis added).

³¹*Kirby v. Callahan*, 975 F. Supp. 1290, 1292 (D. Kan. 1997) (citing *Castellano v. Sec'y of Health & Human Servs.*, 26 F.3d 1027, 1029 (10th Cir. 1994); *Hargis v. Sullivan*, 945 F.2d 1482 10th Cir. 1991)).

medication; here plaintiff was not prescribed any narcotic medication.³² The ALJ did not err in failing to consider “what attempts plaintiff made to relieve [her] pain—including whether [she] took pain medication—in an effort to evaluate the veracity to plaintiff’s contention that [her] pain was so severe as to be disabling.”³³

Plaintiff was prescribed other, less potent medications to relieve her pain. Plaintiff had taken muscle relaxers for her pain and had done trials of physical therapy in an effort to reduce her pain. (Tr. 86, 143.) *Luna* directs the ALJ to consider whether plaintiff has made persistent attempts to find relief for her pain, and whether she has demonstrated her willingness to try whatever treatment is prescribed. The ALJ did not address plaintiff’s history of prescribed medications, her compliance with prescribed treatments and medication, nor her attempts to seek relief through physical therapy. The ALJ did note that plaintiff experienced no side effects from the medication she was taking at the time of the hearing. But, he neglected to consider the evidence that plaintiff had experienced side effects with other medications she had taken in the past; and that her physician would respond by prescribing a different medication. Similarly, the ALJ made no findings concerning the frequency and regularity of plaintiff’s contact with doctors.

Thus, the ALJ did not consider evidence that plaintiff had been persistent in seeking relief, changing prescriptions that caused side effects, until she found a medication that did not. This, of course is evidence that weighs in favor of her credibility. Nor did the ALJ consider the frequency or infrequency of plaintiff’s contacts with doctors, evidence that weighs for or against the credibility

³²*Graham v. Sullivan*, 794 F. Supp. 1045, 1053 (D. Kan. 1992) (citing *Teter v. Heckler*, 775 F.2d 1104, 1107 (10th Cir. 1985); *Weakley v. Heckler*, 795 F.2d 64, 66 (10th Cir. 1986)).

³³*Qualls v. Apfel*, 206 F.3d 1368, 1372 (10th Cir. 2000) (citing *Hargis v. Sullivan*, 945 F.2d 1482, 1489 (10th Cir. 1991); *Luna v. Bowen*, 834 F.2d 161, 165-66 (10th Cir. 1987)).

of her subjective complaints of pain.

The ALJ must consider all the evidence when making his decision, not just the evidence that is favorable to his position.³⁴ The court cannot uphold the ALJ's decision when it is not supported by substantial evidence in the record.³⁵

Finally, in evaluating her credibility, the ALJ considered the fact that plaintiff had filed a lawsuit over the car accident in which she had sustained the allegedly disabling injuries. The ALJ believed that a favorable decision on plaintiff's disability claim would have supported plaintiff's contentions in the lawsuit, and thus questioned her credibility. While this may have been a relevant consideration in evaluating her credibility, it no longer was; for by the time of the ALJ's hearing, this litigation had been settled out of court. (Tr. 10, 331).³⁶

C. ALJ's assessment that Plaintiff Can Perform the Full Range of Light Work in the Medical-Vocational Guidelines

Plaintiff's final argument is that the ALJ's determination that she can perform the full range of light work as defined in the Medical-Vocational Guidelines (grids) is in error considering her RFC and nonexertional limitations. Plaintiff first argues that there is no medical basis for the ALJ's determination that plaintiff's RFC included the ability to lift up to 20 pounds and do the walking and standing required in the light work range of the grids. Plaintiff's RFC must be determined by the ALJ and supported by substantial evidence.³⁷ The ALJ must determine plaintiff's RFC based on "all

³⁴*Edgar v. Shalala*, 859 F. Supp. 521, 525 (D. Kan. 1994).

³⁵*White*, 271 F.3d at 1257 (citing *Castellano*, 26 F.3d at 1029).

³⁶*See McKenney v. Apfel*, 38 F. Supp. 2d 1249, 1257 (D. Kan. 1999) ("Although [plaintiff's] pending litigation should not be the sole factor in determining his credibility, it was proper for the ALJ to consider with the evidence as a whole.")

³⁷*Thompson*, 987 F.2d at 1491.

of the relevant evidence including medical records, observations of treating physicians and others, and plaintiff's own description of his limitations.”³⁸ The ALJ may also consider any residual functional capacity forms completed by medical consultants.³⁹ Here the ALJ relied solely on the State agency physician’s opinion. This physician examined plaintiff and the record and entered his findings on a residual functional capacity assessment form. (Tr. 87-94.) The ALJ simply concurred with the State agency physician’s opinion and did no further analysis of the record himself. On remand, the ALJ must look at the record as a whole and determine plaintiff’s RFC. In addition, plaintiff’s RFC must be evaluated considering the ALJ’s reevaluated credibility determination.

Plaintiff further argues that the ALJ erred by using the grids and not relying on the testimony of a Vocational Expert (VE). The Tenth Circuit has held that “[a]utomatic application of the grids is appropriate only when a claimant’s RFC, age, work experience, and education precisely match a grid category.”⁴⁰ It is usually an error for the ALJ to use the grids when plaintiff has a nonexertional impairment such as pain.⁴¹ However, if the ALJ can prove that the claimant has no significant nonexertional impairment, that the claimant can do the full range of work at some RFC level on a daily basis, and that the claimant can perform most of the jobs in that RFC level, use of the grids is proper.⁴² It appears the ALJ did not consider plaintiff’s pain, which the ALJ had determined was

³⁸*Noble v. Callahan*, 978 F. Supp. 980, 987 (D. Kan. 1997) (citing 20 C.F.R. §§ 404.1545-46, 416.945-46).

³⁹*Id.* (citing 20 C.F.R. § 404.1527(f)(2)).

⁴⁰*Gossett v. Bowen*, 862 F.2d 802, 806 (10th Cir. 1988) (citing *Heckler v. Campbell*, 461 U.S. 458, 462, 103 S.Ct. 1952, 1955 (1983); *Houston v. Bowen*, 838 F.2d 1125, 1131 (10th Cir. 1988); *Gatson v. Bowen*, 838 F.2d 442, 446 (10th Cir. 1988); *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984); 20 C.F.R. pt. 404, subpt P, App. 2 § 200.00(e)(2)).

⁴¹*Thompson*, 987 F.2d at 1488.

⁴²*Id.* at 1487-1488.

credible as to the extent of her symptoms, but not as to their disabling effect. The Tenth Circuit has held that “[p]ain, even if not disabling, is still a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant’s pain is insignificant.”⁴³ It is an error for the ALJ to make a determination that plaintiff is not credible as to the disabling extent of her pain and then ignore the pain completely throughout the rest of the analysis.⁴⁴ It appears that this is what the ALJ did in this case.

The ALJ must redetermine plaintiff’s RFC after he reconsiders the disabling extent of her pain, and reconsiders the effect of her dizziness. He must then determine what effect the pain and dizziness have on plaintiff’s RFC and look at the record as a whole to determine what plaintiff’s exertional and nonexertional limitations are. Then the ALJ must determine if there are significant nonexertional limitations based on the pain the ALJ believes plaintiff to be in, and whether there are any other significant nonexertional limitations based on plaintiff’s other impairments. If there are nonexertional limitations which cause a significant amount of the job base at plaintiff’s RFC to diminish, the ALJ should call a VE to give expert testimony about whether plaintiff retains the ability to perform a significant number of jobs in the national economy.

V. Conclusion

In sum, having carefully reviewed the record in this case and having considered plaintiff’s arguments in light of the record, the Court concludes that the ALJ’s opinion was not supported by substantial evidence or was based on an incorrect application of the law. Remand is appropriate when the administrative record has not been fully developed, or where, as is the case here, the ALJ

⁴³*Id.* at 1490-91 (citing *Ray v. Bowen*, 865 F.2d 222, 225 (10th Cir. 1989); *Gossett*, 862 F.2d at 807-08)).

⁴⁴*Id.* at 1491.

makes minimal findings that are not supported by adequate evaluation of the evidence in the record.⁴⁵ Here, the ALJ did not adequately evaluate, support or explain his evaluation of the credibility of plaintiff's subjective complaints of pain. The ALJ's findings concerning plaintiff's daily activities were not based on substantial evidence, failed to discuss contrary evidence in the record, considered irrelevant evidence, and considered matters outside of the record. The ALJ's findings concerning plaintiff's attempts to seek relief and treatment were not based on substantial evidence, and failed to consider plaintiff's compliance with treatment and a regimen of non- narcotic prescription medications and her husband's questionnaire.

Nor did the ALJ adequately evaluate, support or explain his determination of plaintiff's RFC. In determining RFC, the ALJ simply concurred with the State agency physician's opinion and did no further analysis of the record himself. In determining her RFC, the ALJ failed to consider plaintiff's pain, whether or not disabling, and his erroneous analysis of her credibility means that his determination of her RFC did not include a determination of the extent of her pain, as well as the effect of her dizziness. Such analysis may affect whether there are nonexertional limitations requiring the ALJ to rely on a Vocational Expert, as well. Therefore, the Court finds that this action should be reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to conduct further proceedings.

IT IS THEREFORE ORDERED BY THE COURT THAT defendant's decision denying plaintiff disability benefits is reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g).

IT IS SO ORDERED.

Dated this 7th day of May, 2004, at Topeka, Kansas.

⁴⁵See *Taylor v. Callahan*, 969 F. Supp. 664, 673 (D. Kan. 1997) (citations omitted).

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge